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**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

In re:

PG&E CORPORATION

-and-

**PACIFIC GAS AND ELECTRIC
COMPANY,**

Debtors.

- ☐ Affects PG&E Corporation
- ☐ Affects Pacific Gas and Electric Company
- ☒ Affects both Debtors

**All papers shall be filed in the Lead Case,
No. 19-30088 (DM)*

Bankruptcy Case
No. 19-30088 (DM)

Chapter 11
(Lead Case)
(Jointly Administered)

**OMNIBUS OBJECTION OF THE
OFFICIAL COMMITTEE OF TORT
CLAIMANTS (SUBSTANTIVE) TO NO
LIABILITY CLAIMS FILED BY THE
DEPARTMENT OF HOMELAND
SECURITY / FEDERAL EMERGENCY
MANAGEMENT AGENCY (CLAIM
NOS. 59692, 59734 & 59783)**

Date: January 14, 2020
Time: 10:00 a.m. (Pacific Time)
Place: United States Bankruptcy Court
Courtroom 17, 16th Floor
San Francisco, CA 94102

Objection Deadline: December 31, 2019

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THIS OBJECTION SEEKS TO DISALLOW AND/OR MODIFY CERTAIN FILED PROOFS OF CLAIM. CLAIMANTS RECEIVING THIS OBJECTION SHOULD LOCATE THEIR NAMES AND CLAIMS ON EXHIBIT A ATTACHED TO THIS OBJECTION.

The Official Committee of Tort Claimants (the “TCC”) in the chapter 11 cases (the “**Chapter 11 Cases**”) of the above-captioned debtors (collectively, the “**Debtors**”), hereby files this Objection, pursuant to section 502 of title 11 of the United States Code (the “**Bankruptcy Code**”), Rule 3007 of the Federal Rules of Bankruptcy Procedure (the “**Bankruptcy Rules**”), and Rule 3007-1 of the Bankruptcy Local Rules for the United States District Court for the Northern District of California (the “**Bankruptcy Local Rules**”), to each of the claims listed on Exhibit A hereto (the “**FEMA Claims**”). For the reasons set forth below, the Debtors have no liability to the Department of Homeland Security / Federal Emergency Management Agency (“**FEMA**”) for each of the FEMA Claims. In support of the Objection, the TCC relies on the Declaration of Eric Goodman attached hereto as Exhibit B, and respectfully represents as follows:

I. INTRODUCTION

The Debtors are liable for the death and destruction caused by the Butte Fire, the North Bay Fires and the Camp Fire. The individuals and businesses impacted by these wildfires have filed over 72,000 proofs of claim. The Debtors are liable to these individuals and businesses for the physical injuries and real property damage proximately caused by their faulty electric lines and equipment. But it does not follow from this that the Debtors are also liable to FEMA.

FEMA has filed claims for over \$3.9 billion in the Chapter 11 Cases based on federal assistance provided in response to the Butte Fire, the North Bay Fires and the Camp Fire. FEMA asserts three legal theories of recovery. First, FEMA invokes Section 317 of the Stafford Act, a statute that creates liability when a person intentionally causes a major disaster. Second, FEMA invokes the definitions of “nuisance” and “public nuisance” under California law. Finally, FEMA asserts the right to “restitution” for “unjust enrichment.” The assertion of these legal theories is flawed. While the Debtors are convicted felons and are liable to the fire victims, FEMA does not allege that the Debtors intended to cause the fires at issue. Nor does FEMA offer any explanation

1 as to how the Debtors are liable to FEMA under California law. The FEMA Claims lack sufficient
2 factual allegations, are not *prima facie* valid, and should be disallowed and expunged.

3 The TCC objects to the FEMA Claims at this time because doing so is necessary to advance
4 the Chapter 11 Cases. The wildfire victims will eventually be asked to vote on a plan of
5 reorganization. FEMA's claims purport to be based on federal statutory and executive authorities
6 and policies whose object is to assist the public and the wildfire victims. The FEMA Claims, if
7 successful, would take money from the wildfire victims in contravention of such framework. For
8 these reasons, and the reasons set forth below, the FEMA Claims are ripe for adjudication and
9 should be disallowed prior to plan confirmation.

10 **II. JURISDICTION**

11 This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157 and 1334,
12 the Order Referring Bankruptcy Cases and Proceedings to Bankruptcy Judges, General Order 24
13 (N.D. Cal.), and Bankruptcy Local Rule 5011-1(a). This is a core proceeding pursuant to 28 U.S.C.
14 § 157(b). The TCC consents to the entry of a final order by the Court in connection with this
15 Objection to the extent that it is later determined that the Court, absent the consent of the parties,
16 cannot enter final orders or judgments consistent with Article III of the United States Constitution.
17 Venue is proper before the Court pursuant to 28 U.S.C. §§ 1408 and 1409.

18 **III. RELIEF REQUESTED**

19 By this Objection, the TCC seeks the entry of an Order, pursuant to section 502 of the
20 Bankruptcy Code, Bankruptcy Rule 3007, and Bankruptcy Local Rule 3007-1, disallowing and
21 expunging the FEMA Claims listed on Exhibit A hereto. A proposed form of order granting the
22 relief requested herein on a final basis is attached hereto as Exhibit C.

23 **IV. BACKGROUND**

24 **A. The Wildfires and the Disaster Declarations**

25 Butte Fire. On September 9, 2015, a wildfire that became known as the "Butte Fire" started
26 in Amador County, California and quickly spread to Calaveras County, California. *See* Goodman
27 Decl. at Ex. 1. On September 11, 2015, Governor Edmund G. Brown, Jr. issued an emergency
28 proclamation for Amador and Calaveras Counties due to the effects of the Butte Fire. *Id.* at Ex. 2.

1 On September 22, 2015, the President issued a major disaster declaration under the Robert T.
2 Stafford Disaster Assistance and Emergency Relief Act (the “**Stafford Act**”), 42 U.S.C. §§ 5121
3 *et seq.*, (FEMA-4240-DR-CA) and authorized FEMA to provide individual assistance for Calaveras
4 County. *Id.* at Ex. 3. On September 24, 2015 and October 8, 2015, the major disaster declaration
5 was amended to authorize public assistance for Calaveras County.

6 The destruction caused by the Butte Fire affected thousands of people. The Butte Fire
7 burned 70,868 acres, resulted in 2 fatalities, destroyed 965 structures (including 549 homes, 368
8 outbuildings and 4 commercial properties), and damaged 44 structures. *Id.* at Ex. 4, Part 1, p. 22.
9 The California Department of Forestry and Fire Protection (“**Cal Fire**”) found that PG&E and/or
10 its contractors failed to identify potential hazards during its vegetation management program, which
11 led to a tree contacting PG&E’s electric line, igniting the Butte Fire. *Id.*

12 North Bay Fires. On October 8 through October 10, 2017, over a dozen wildfires that
13 became known as the “North Bay Fires” started in Butte, Lake, Mendocino, Napa, Nevada, Solano,
14 Sonoma and Yuba Counties, California. *Id.* at Ex. 5, pp. 27-28. On October 9, 2017, Governor
15 Edmund G. Brown, Jr. issued an emergency proclamation for Napa, Sonoma and Yuba Counties
16 due to the effects of the North Bay Fires. *Id.* at Ex. 6.

17 On October 10, 2017, the President issued a major disaster declaration under the Stafford
18 Act (FEMA-4344-DR-CA) and authorized FEMA to provide public assistance for Butte, Lake,
19 Mendocino, Napa, Nevada, Sonoma and Yuba Counties. *Id.* at Ex. 7. On October 12, 2017, the
20 major disaster declaration was amended to authorize individual assistance for Sonoma County. *Id.*
21 at Ex. 8. From October 13 to October 15, 2017, the major disaster declaration was amended three
22 more times to authorize public assistance for Solano County and individual assistance for Butte,
23 Lake, Mendocino, Napa, Nevada and Yuba Counties. *Id.* at Exs. 9-11. On November 28, 2017,
24 the major disaster declaration was further amended to authorize additional categories of public
25 assistance for Butte, Lake, Mendocino, Napa, Sonoma and Yuba Counties. *Id.* at Ex. 12.

26 The destruction caused by the North Bay Fires was unprecedented at the time. The North
27 Bay Fires burned over 245,000 acres, damaged or destroyed 14,700 homes, 3,600 vehicles, and 728
28 businesses, and resulted in 44 fatalities and hospitalized over 185 others. *See Debtors’ Request for*

Judicial Notice, *Herndon v. PG&E Corp.*, Adv. Pro. No. 19-03005 (Bankr. N.D. Cal. Mar. 18, 2019), Dkt. No. 10-2, at ¶ J. Cal Fire found that PG&E's faulty equipment and its failure to identify hazards during its vegetation management program ignited 19 of the 21 North Bay Fires. *Id.* at Ex. I, 43. A trial on the Debtors' liability for the Tubbs Fire is scheduled to begin in January 2020.

Camp Fire. On November 8, 2018, what became known as the "Camp Fire" started in Butte County, California. *See* Goodman Decl. at Ex. 13. On November 12, 2018, the President issued a major disaster declaration under the Stafford Act (FEMA-4407-DR-CA) and authorized FEMA to provide public assistance and individual assistance to Butte County. *Id.* at Ex. 14.

The destruction caused by the Camp Fire was unprecedented. The Camp Fire consumed 153,336 acres, caused 85 civilian fatalities, and destroyed 13,972 residences, 528 commercial structures and 4,293 other buildings. *Id.* at Ex. 15, 41. The Camp Fire was caused by unsafe electrical infrastructure owned, operated, and improperly maintained by PG&E. *Id.* at Ex. 13. PG&E has estimated damage claims from the Camp Fire at over \$10.5 billion. *Id.* at Ex. 15, 47.

B. The Wildfire Claims

The Debtors caused the Butte Fire, the North Bay Fires and the Camp Fire. Individuals and businesses impacted by these fires have filed over 72,000 proofs of claim. The total value of the fire victims' claims is the subject of a contested estimation proceeding.

Government entities also filed proofs of claim in the Chapter 11 Cases. FEMA's claims exceed \$3.9 billion. Certain California State Agencies filed claims, including the California Governor's Office of Emergency Services ("Cal OES"). Cal OES' claims total \$2.8 billion, of which \$2.5 billion is for the recovery of amounts paid by FEMA and is, therefore, duplicative of the FEMA Claims. Various public entities also filed claims, including the public entities that purportedly settled with the Debtors for \$1 billion. The government claims compete with and have the potential to diminish the funds available to pay individual fire victims and businesses.

C. The FEMA Claims

FEMA filed three proofs of claim to recover costs incurred by FEMA in providing assistance to individuals, state and local governments and private non-profits. The first proof of claim (Claim No. 59692) asserts that the Debtors are liable to FEMA for \$2.55 billion in funds

1 expended as a result of the Camp Fire. The second proof of claim (Claim No. 59734) asserts that
2 the Debtors are liable to FEMA for \$1.22 billion in funds expended as a result of the North Bay
3 Fires. The third proof of claim (Claim No. 59783) asserts that the Debtors are liable to FEMA for
4 \$160 million in funds expended as a result of the Butte Fire.

5 All three proofs of claim seek to recover costs that fall into three broad categories:
6 (1) *public assistance*—direct assistance and financial assistance to state and local governments,
7 tribal governments, and certain private non-profits for debris removal, emergency protective
8 measures, and permanent repair/replacement of damaged infrastructure; (2) *individual assistance*—
9 financial assistance to individuals and householders for repair/replacement of damaged housing,
10 temporary housing, and other needs, direct temporary housing assistance to individuals and
11 households, and financial assistance to government agencies or non-profits to provide community
12 services for disaster unemployment, crisis counseling, case management, and legal services; and
13 (3) *administrative costs*—FEMA’s direct costs incurred in administering its major disaster
14 assistance programs, including wages, travel, support from other federal agencies, support from
15 contractors, temporary facility expenses, and supplies and equipment.

16 FEMA alleges three bases for why the Debtors are liable for these costs. First, FEMA
17 invokes Section 317 of the Stafford Act (42 U.S.C. § 5160(a)), a statute that creates liability where
18 a person intentionally causes a major disaster. Second, FEMA invokes the definitions of “nuisance”
19 and “public nuisance” under California law (Cal. Civ. Code §§ 3479 & 3480). Finally, FEMA
20 asserts the right to “restitution” for “unjust enrichment” under California law.

21 Critically, FEMA does not allege that the Debtors intentionally caused the wildfires.
22 FEMA asserts that its assistance was required “by a condition caused by the Debtors,” namely, the
23 Debtors’ failure to maintain their equipment. But negligence is not the equivalent of intentionally
24 causing a fire or committing arson, which is something FEMA does not allege. Nor does FEMA
25 offer any explanation as to how the definitions of “nuisance” and “public nuisance” or the
26 invocation of the doctrine of “unjust enrichment” provide FEMA with claims against the Debtors.

V. BASIS FOR RELIEF REQUESTED

Section 502(b)(1) of the Bankruptcy Code provides, in relevant part, that a claim may not be allowed to the extent that “such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law.” 11 U.S.C. § 502(b)(1). When asserting a claim against a bankrupt estate, a claimant must allege facts that, if true, would support a finding that the debtor is legally liable to the claimant. *See In re King Street Invs., Inc.*, 219 B.R. 848, 858 (B.A.P. 9th Cir. 1998). Where the claimant alleges sufficient facts to support its claim, its claim is afforded *prima facie* validity. *See Wright v. Holm (In re Holm)*, 931 F.2d 620, 623 (9th Cir. 1991) (quoting 3 COLLIER ON BANKRUPTCY § 502.02, at 502-22 (Lawrence King, 15th ed. 1991)).

A party wishing to dispute a claim afforded *prima facie* validity must “produce evidence and show facts tending to defeat the claim by probative force equal to that of the allegations of the proofs of claim themselves.” *Id.* Once the objecting party produces such evidence, the burden shifts back to the claimant to prove the validity of his or her claim by a preponderance of the evidence. *See In re Pugh*, 157 B.R. 898, 901 (B.A.P. 9th Cir. 1993). Ultimately, the burden of persuasion is on the claimant. *See Holm*, 931 F.2d at 623.

Pursuant to Bankruptcy Rule 3007(d), a party in interest is permitted to file omnibus objections to more than one claim on the bases enumerated therein, which include, among other things, where the “claims were filed by the same entity.” Fed. R. Bankr. P. 3007(d). Here, the FEMA Claims, each of which was filed by the same entity, lack *prima facie* validity because FEMA failed to allege facts that, if true, would support a finding that the Debtors are liable to FEMA. Because the FEMA Claims lack *prima facie* validity, no affirmative evidence must be offered by the TCC for the Court to disallow and expunge the FEMA Claims.

A. Section 317 of the Stafford Act

As to FEMA’s first legal theory of liability, FEMA has failed to allege facts sufficient to support legal liability under Section 317 of the Stafford Act (42 U.S.C. § 5160(a)).

1. Free Public Services Doctrine

Consideration of FEMA’s Section 317 claim must begin with the “free public services doctrine,” which provides that a governmental entity cannot recover the costs of carrying out public

1 services, including response to fires, from a tortfeasor whose conduct caused the need for the
2 services, absent specific statutory authorization or damage to government-owned property.
3 *See United States v. Standard Oil Co. of Cal.*, 332 U.S. 301, 314-17 (1947) (holding that the federal
4 government has no federal common law right to recover costs of medical care and sick pay from
5 tortfeasors who injure soldiers absent legislative action); *City of Flagstaff v. Atchison, Topeka &*
6 *Santa Fe Ry. Co.*, 719 F.2d 322, 323 (9th Cir. 1983) (municipality that committed police, fire and
7 other relief measures to major emergency cannot recover from tortfeasor where recovery is not
8 authorized by statute or regulation); *County of Lassen v. State of Cal.*, 4 Cal. App. 4th 1151, 1156-
9 57, 6 Cal. Rptr. 2d 359, 362 (Cal. Ct. App. 1992) (government entity could not recover costs and
10 attorneys' fees incurred in defending class action lawsuit from the State of California absent
11 statutory authorization); *County of San Luis Obispo v. Abalone Alliance*, 178 Cal. App. 3d 848,
12 858-59, 223 Cal. Rptr. 846, 851 (Cal. Ct. App. 1986) (government entity could not recover costs
13 of abating public nuisance through exercise of police power absent specific statutory authorization);
14 *People v. Wilson*, 240 Cal. App. 2d 574, 576-77, 49 Cal. Rptr. 792, 794 (Cal. Ct. App. 1966) ("No
15 case has been cited, and we have found none, which permits, in the absence of a statute, the recovery
16 of fire suppression expenses by one not protecting his own property. ... Thus, recovery for fire
17 suppression expenses by a state or other public agency is a creature of statute."); *accord Matter of*
18 *Oil Spill by Amoco Cadiz Off Coast of France on March 16, 1978*, 954 F.2d 1279, 1310 (7th Cir.
19 1992) (finding costs incurred by public agencies in responding to an oil spill could be recovered
20 from tortfeasor because, even though "courts decline to require tortfeasors to compensate the
21 government for the cost of services" absent statutory authorization under the "free public services
22 doctrine," statute authorized recovery making doctrine inapplicable); *Dist. of Columbia v. Air Fla.,*
23 *Inc.*, 750 F.2d 1077, 1080 (D.C. Cir. 1984) (absent statutory authorization, expenses or
24 extraordinary emergency services District of Columbia expended in cleaning up after a plane crash
25 could not be recovered from airline, alleged negligent tortfeasor); *Allenton Volunteer Fire Dep't v.*
26 *Soo Line R.R.*, 372 F. Supp. 422, 424 (E.D. Wis. 1974) (fire department could not recover costs of
27 extinguishing fire involving trains from railroad absent statutory authorization); *Koch v. Consol.*
28 *Edison Co. of New York, Inc.*, 468 N.E.2d 1, 8 (N.Y. 1984) ("The general rule is that public

1 expenditures made in the performance of governmental functions are not recoverable.”); *Town of*
2 *Freetown v. New Bedford Wholesale Tire, Inc.*, 423 N.E.2d 997, 997-98 (Mass. 1981) (finding that
3 there is “no authority for common law recovery by a town of its expenses in fighting a fire” and
4 that “the right of the town to recover firefighting expenses depends on statute.”); *Town of Howard*
5 *v. Soo Line R.R.*, 217 N.W.2d 329, 330 (Wis. 1974) (liability of railroad for setting grass fire could
6 not be imposed in favor of town absent statutory authorization); *Walker County v. Tri-State*
7 *Crematory*, 643 S.E.2d 324, 327 (Ga. Ct. App. 2007) (“Georgia, like many jurisdictions, has
8 adopted the common-law free public services doctrine,” which provides “that absent specific
9 statutory authorization or damage to government-owned property, a county cannot recover the costs
10 of carrying out public services from a tortfeasor whose conduct caused the need for the services.”).

11 In *City of Flagstaff*, the Ninth Circuit considered whether a municipality—the City of
12 Flagstaff—could recover the cost of police, fire and other relief measures incurred as a result of a
13 major emergency—namely, the derailment of railroad cars carrying petroleum gas—from the
14 tortfeasor who caused the accident. 719 F.2d at 323. The City sued the railroad company on the
15 theory that the city’s expenditures were compensable damages, “arising from either or both the
16 railroad’s negligence or its conduct of an ultrahazardous activity.” *Id.*

17 The Ninth Circuit held that the “identify of the claimant”—a governmental entity—and “the
18 nature of the cost”—fire-related expenditures incurred as a result of a major disaster—precluded
19 recovery on the theory of the tort presented. *Id.* at 324. The Ninth Circuit found that the “cost of
20 public services for protection from fire or safety hazards is to be borne by the public as a whole,
21 not assessed against the tortfeasor whose negligence creates the need for the service.” *Id.* at 323.
22 The Ninth Circuit explained that when “such services are provided by the government and the costs
23 are spread by taxes, the tortfeasor does not expect a demand for reimbursement. This is so even
24 though the tortfeasor is fully aware that private parties injured by its conduct, who cannot spread
25 their risk to the general public, will have a cause of action against it for damages proximately or
26 legally caused.” *Id.* Accordingly, under *City of Flagstaff*, for the government to have a cause of
27 action for its damages, “the legislature and its public deliberative process, rather than the court, is
28

1 the appropriate forum to address such fiscal concerns.” *Id.* at 324 (following *Standard Oil*). Thus,
2 recovery is permitted when it is “authorized by statute or regulation.” *Id.*

3 In *City of Flagstaff*, the Ninth Circuit purported to apply “Arizona law,” although it did not
4 cite a single Arizona decision. *Id.* at 323 (“having the case before us, we must decide it as we think
5 the Arizona courts would”). As noted above, the free public services doctrine is more firmly rooted
6 in California law. *See County of Lassen*, 4 Cal. App. 4th at 1156-57; *County of San Luis Obispo*,
7 178 Cal. App. 3d at 858-59; *Wilson*, 240 Cal. App. 2d at 576-77. In fact, the California Court of
8 Appeals’ decision in *Wilson* is frequently cited as a foundational decision for the doctrine. *See*,
9 *e.g.*, *Air Fla.*, 750 F.2d at 1080 (citing *Wilson* in support of the “common-law rule” that “absent
10 authorizing legislation, the cost of public services for protection from fire or safety is to be borne
11 by the public as a whole, not assessed against the tortfeasor whose negligence creates the need for
12 the service.”); *Allenton Volunteer Fire Dep’t*, 372 F. Supp. at 423 (citing *Wilson* and finding that
13 “only two cases on the topic of charging for fire suppression expenses have been discussed by the
14 parties, and both have rejected plaintiff’s position in the absence of a statute authorizing
15 recovery.”); *Town of Freetown*, 423 N.E.2d at 997-98 (citing *Wilson* and finding that there is “no
16 authority for common law recovery by a town of its expenses in fighting a fire.”); *Town of Howard*,
17 217 N.W.2d at 330 (citing *Wilson* to support the proposition that “any liability for the cost of
18 extinguishing a negligently set fire must be imposed by statute as there is no common-law liability
19 permitting a town to charge a railroad for such services or to recover for fire suppression
20 expenses.”).

21 Here, the “identify of the claimant”—the United States or FEMA—and “the nature of the
22 cost”—public assistance, individual assistance and administrative costs resulting from a major
23 disaster—generally preclude recovery. *See City of Flagstaff*, 719 F.2d at 324. The United States,
24 like the City of Flagstaff, has the right to collect revenue through taxation and spread the costs of
25 major disasters. In addition, FEMA, as a federal agency, can adopt user fees for a “service or things
26 of value.” *See* 31 U.S.C. § 9701(a) (“It is the sense of Congress that each service or thing of value
27 provided by an agency ... to a person ... is to be self-sustaining to the extent possible.”); 31 U.S.C.
28 § 9701(b) (“The head of each agency ... may prescribe regulations establishing the charge for a

service or thing of value provided by the agent.”). The *City of Flagstaff* is, therefore, directly on point, which means that the costs FEMA seeks to recover through the FEMA Claims are not recoverable unless expressly “authorized by statute or regulation.” *Id.* at 324.

2. Statutory Exception

Thus, the key to evaluating FEMA’s Section 317 claim is whether Section 317 provides a statutory basis for recovery against the Debtors. Section 317 of the Stafford Act provides:

Any person who intentionally causes a condition for which Federal assistance is provided under this Act or under any other Federal law as a result of a declaration of a major disaster or emergency under this Act shall be liable to the United States for the reasonable costs incurred by the United States in responding to such disaster or emergency to the extent that such costs are attributable to the intentional act or omission of such person which caused such condition. Such action for reasonable costs shall be brought in an appropriate United States district court.

42 U.S.C. § 5160(a). Section 317 makes a person liable to the United States for disaster-response costs if that person “intentionally” causes a major disaster. *Id.*

The legislative history for Section 317 of the Stafford Act shows that Congress considered, and rejected, a version of Section 317 that would have permitted FEMA to recover based on negligence. *Compare* 134 Cong. Rec. H938-03, 1988 WL 1084748 (Mar. 17, 1988) (language in Section 317 created liability for any “person who negligently or intentionally causes or contributes to a condition ...”); *with* 134 Cong. Rec. H10840-02, 1988 WL 182206 (Oct. 21, 1988) (language in Section 317 creates liability for any “person who intentionally causes a condition ...”).

Further, under the *expressio unius* interpretive canon, Congress’ grant of authority for FEMA to recover from a person who intentionally causes harm precludes recovery based on lesser theories of negligence or recklessness. *See Baldwin v. United States*, 921 F.3d 836, 843 (9th Cir. 2019) (“[W]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.”) (quoting *Hillman v. Maretta*, 569 U.S. 483, 496 (2013)); *Webb v. Smart Document Solutions, LLC*, 499 F.3d 1078, 1084 (9th Cir. 2007) (“The canon of statutory construction *expressio unius est exclusio alterius* ... ‘creates a presumption that when a statute designates certain persons, things, or manners of operation, all omissions should be understood as exclusions.’”)

(quoting *Silvers v. Sony Pictures Entm't, Inc.*, 402 F.3d 881, 885 (9th Cir. 2005)); *Allentown Volunteer Fire Dep't*, 372 F. Supp. at 423 (“[T]he fact that the legislature specifically authorized recovery of fire-fighting expenses in special aggravated circumstances strongly suggests that a right of recovery was not contemplated as a general rule.”).

In the FEMA Claims, FEMA points to the fact that Cal Fire found that the Debtors’ electrical transmission lines and/or equipment caused the wildfires at issue—the 2015 Butte Fire, the 2017 North Bay Fires and the 2018 Camp Fire. FEMA then quotes Section 317 of the Stafford Act as its statutory authorization and asserts that the costs FEMA expended were required “by a condition caused by the Debtor.” 42 U.S.C. § 5160(a). FEMA maintains that this means that Section 317 of the Stafford Act gives it the right to recover \$3.9 billion from the Debtors, thus jeopardizing the ability of individual victims and businesses to recover from the Debtors.

Section 317 of the Stafford Act, however, requires that the person “intentionally causes a condition for which Federal assistance is provided under this Act or under any other Federal law as a result of a declaration of a major disaster or emergency under this Act.” *Id.* (emphasis added). The “condition” resulting in the provision of assistance and/or the declaration of a major disaster was a wildfire, not the faulty state of the Debtors’ transmission lines and/or equipment. *Id.* The conduct required under Section 317 of the Stafford Act is intentionally causing a wildfire, which was the “condition for which Federal assistance” was provided. *Id.*

The phrase “intentionally caused” limits the application of Section 317 of the Stafford Act to intentional torts. Under California law, for a result to be caused “intentionally,” the actor must “either desire the result or know, to a substantial certainty, that the result will occur.” *Estate of Kramme v. Kramme*, 20 Cal. 3d 567, 572-73, 573 P.2d 1369, 1372 (Cal. 1978). Thus, the actor must intend to produce the harms that ensues and “not simply the act itself.” *In re Baldwin*, 249 F.3d 912, 918 (9th Cir. 2001) (“Intentional torts generally require that the actor intend ‘the consequences of an act,’ not simply ‘the act itself.’”) (quoting *Kawaauhau v. Geiger*, 523 U.S. 57, 61-62 (1998)); 5 Witkin, Summary 11th Torts § 24 (2019) (“An intentional tort is “one in which the actor intends to produce the harm that ensues; it is not enough that he intends to perform the act.”). “Willful misconduct” is not an intentional tort, but simply “an aggravated form of

1 negligence, differing in quality rather than degree from ordinary lack of care.” *Berkely v. Dowds*,
2 152 Cal. App. 4th 518, 526, 61 Cal. Rptr. 3d 304, 310-11 (Cal. Ct. App. 2007).

3 The FEMA Claims simply do not allege that the Debtors intended to cause the wildfires at
4 issue or committed arson. Rather, the FEMA Claims are based on Cal Fire’s findings that the
5 Debtors caused the wildfires, which findings do not include that the Debtors acted with the requisite
6 intent necessary to trigger Section 317 of the Stafford Act. FEMA is attempting to twist the
7 statute’s language to permit it to recover based on negligence, which, again, is the very standard
8 Congress considered and rejected.

9 FEMA also invokes Section 312 of the Stafford Act. *See* 42 U.S.C. § 5155(c). But, as the
10 Ninth Circuit’s decision in *State of Hawaii ex rel. Attorney General v. FEMA* shows, Section 312
11 of the Stafford Act gives FEMA the right to seek reimbursement from state agencies and public
12 entities that received assistance from FEMA when benefits are “available” from another source.
13 294 F.3d 1152, 1165 (9th Cir. 2002). Liability arising under Section 312 of the Stafford Act does
14 not give rise to a direct claim against the Debtors. FEMA has no right to recover from the Debtors
15 under the Stafford Act absent a showing that the Debtors intentionally caused the wildfires, which,
16 again, is a fact that FEMA does not allege in the FEMA Claims.

17 **B. Public Nuisance and Unjust Enrichment Claims**

18 FEMA’s second and third bases for liability—“public nuisance” and “unjust enrichment”
19 under California law—also fail. These bases for liability are unintelligible as asserted by FEMA
20 in its proofs of claim and are precluded under the “free public services doctrine” as applied by
21 California courts. These bases for liability are also preempted by federal law.

22 **1. Reference to Definitions and Unjust Enrichment Are Not Claims**

23 The FEMA Claims refer generally to the definitions of “nuisance” and “public nuisance” in
24 Sections 3479 and 3480 of California’s Civil Code and principles of “restitution” and “unjust
25 enrichment.” FEMA, however, offers no explanation as to why or how the Debtors are liable to
26 FEMA under California law. As a threshold matter, FEMA’s general reference to definitions and
27 legal principles is not a cause of action.
28

2. State Law Claims are Precluded Under the Free Public Services Doctrine

To the extent that FEMA is asserting common law claims against the Debtors, such claims fail under the “free public services doctrine,” as applied by California courts. As noted above, this doctrine is more firmly rooted in California law than Arizona law—the state law the Ninth Circuit applied in *City of Flagstaff*. 719 F.2d at 322; see *County of Lassen*, 4 Cal. App. 4th at 1156-57; *County of San Luis Obispo*, 178 Cal. App. 3d at 858-59; *Wilson*, 240 Cal. App. 2d at 576-77.

This means that under California law FEMA cannot recover costs of carrying out public services from a tortfeasor whose conduct caused the need for the services absent specific statutory authorization. But, again, FEMA fails to cite any statutory authority supporting its right to recover from the Debtors under California law, relying instead on the definition of “public nuisance” and the doctrine of “unjust enrichment.” Neither constitutes a statutory authorization that permits FEMA to recover \$3.9 billion from the Debtors’ estates.

3. FEMA’s Common Law Claims are Displaced or Preempted by Federal Law

Finally, FEMA’s claims, to the extent based on federal or state common law, are displaced or preempted by the Stafford Act. Federal common law claims are “displaced” when federal legislation occupies a field that has been made the “subject of comprehensive legislation.” *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 856-57 (9th Cir. 2012) (quoting *City of Milwaukee v. Illinois*, 451 U.S. 304, 314 (1981), and finding that right to assert federal common law public nuisance claim was displaced by federal legislation). Such displacement extends to “all remedies” based on such federal common law claims, leaving the claimant with the rights and remedies available under the federal legislation. *Id.* at 857.

Preemption of state law claims exists “when a state law actually conflicts with federal law” or “when federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the States to supplement it.” *Montalov v. Spirit Airlines*, 508 F.3d 464, 470 (9th Cir. 2007); see *Mason v. Witt*, 74 F. Supp. 2d 955, 962-63 (E.D. Cal. 1999) (state law tort claims asserted by insured against insurer under flood insurance policy preempted by provision in national flood insurance program allowing claims for breach of contract); *Fla. Farm Bureau Gen. Ins. Co. v. Voncille Jernigan*, No. 3:09cv145, 2010 WL 3927816, at *5 (N.D. Fla. Sept. 30,

1 2010) (insurer’s cause of action for unjust enrichment against insureds that received benefits under
2 a flood insurance policy barred because remedy was not included in national flood insurance
3 program, which established comprehensive regulatory scheme that precluded additional remedies
4 not authorized thereunder).

5 The Stafford Act is a comprehensive statute. When the Stafford Act was enacted, Congress
6 stated its intent “to provide an orderly and continuing means of assistance by the Federal
7 Government to State and local governments in carrying out their responsibilities to alleviate the
8 suffering and damage” which result from disasters. 42 U.S.C. § 5121(b). Congress stated that it
9 wanted to encourage “the development of comprehensive disaster preparedness and assistance
10 plans, programs, capabilities, and organizations by the States and local governments.” *Id.*
11 Congress stated that it wanted to encourage “hazard mitigation measures and reduce losses from
12 disaster, including development of land use and construction regulations.” *Id.*

13 The Stafford Act includes two mechanisms through which FEMA can hold parties “liable”
14 for disaster payments and reduce losses. The first is Section 317 of the Stafford Act, which makes
15 persons who intentionally cause a major disaster or emergency liable to the United States for the
16 costs of responding to such disaster or emergency. *See* 42 U.S.C. § 5160(a). The second is
17 Section 312 of the Stafford Act, which makes persons who receive assistance for a major disaster
18 or emergency liable to the United States to the extent that such assistance duplicates benefits
19 available to the person for the same purpose from another source. *See* 42 U.S.C. § 5155(c).

20 The framework established by these provisions presumes that FEMA, absent an intentional
21 tort, will not seek to recover directly from a tortfeasor, but will instead allow parties that received
22 assistance and that can assert claims against a tortfeasor to do so, and then seek reimbursement
23 from those parties rather than competing with them. If FEMA could recover directly from a
24 tortfeasor at common law, there would be no point in authorizing FEMA to seek reimbursement
25 from parties that received assistance, as such recovery would be duplicative. Permitting FEMA to
26 assert claims against a tortfeasor would also place FEMA in direct competition with parties from
27 whom it is entitled to seek reimbursement under Section 312 of the Stafford Act. And, permitting
28

1 FEMA to assert common law claims based on negligent or reckless conduct would render
2 Section 317 of the Stafford Act superfluous.

3 The Stafford Act comprehensively governs FEMA's recovery of disaster payments. It
4 follows under *Native Village of Kivalina* and *Montalov* that FEMA cannot rely on common law
5 theories of recovery—federal or state—in order to circumvent the sections of the Stafford Act
6 governing the circumstances under which a person is liable to FEMA for disaster-related costs. To
7 hold otherwise would eviscerate the statutory scheme by permitting FEMA to recover under
8 common law doctrines when it cannot recover under the Stafford Act.

9 **C. Void as Against Federal Policy**

10 The FEMA Claims, as asserted in the Chapter 11 Cases, also fail on policy grounds.
11 FEMA's claims arise from federal statutory and executive authorities and policies whose object is
12 to assist the public and the wildfire victims. FEMA's claims, if successful, would take money from
13 the wildfire victims in contravention of such framework and are thereby not enforceable.

14 **VI. RESPONSES TO THIS OBJECTION**

15 To contest this Objection, the claimant, here FEMA, must file and serve a written response
16 (a "**Response**") so that it is received no later than December 31, 2019 at 4:00 p.m. (Pacific Time)
17 (the "**Response Deadline**"). Such Response must be filed and served on all "Standard Parties" as
18 defined in, and in accordance with, the *Amended Order Implementing Certain Notice and Case*
19 *Management Procedures* entered on May 14, 2019 (EFC No. 1996) ("**Case Management Order**"),
20 so as to be received by no later than the Response Deadline. If a claimant fails to timely file and
21 serve a Response by the Response Deadline, the TCC may present to the Court an appropriate Order
22 disallowing and expunging the FEMA Claims without further notice to the claimant or a hearing.
23 The TCC may file and serve a reply to any Response to this Objection. The TCC reserves the right
24 to seek an adjournment of the hearing on any Response to this Objection, which adjournment will
25 be noted on the notice of agenda for the hearing.

26 **VII. RESERVATION OF RIGHTS**

27 The TCC hereby reserves the right to object in the future to any of the proofs of claim listed
28 in this Objection on any ground, and to amend, modify, and/or supplement this Objection to the

1 extent an objection to a claim is not granted. The TCC further reserves the right to respond to any
2 new legal theories advanced by FEMA in any response to this Objection, including legal theories
3 not set forth in the FEMA Claims. The TCC further reserves the right to commence a proceeding
4 to subordinate any allowed claim held by FEMA or any other governmental entity.

5 **VIII. COMPLIANCE WITH BANKRUPTCY LOCAL RULE 3007-1**

6 In accordance with Bankruptcy Local Rule 3007-1(a), true and correct copies of the claims
7 that are the subject of this Objection are attached hereto as **Exhibit D**. To the best of the TCC's
8 knowledge and belief, this Objection and **Exhibit A** comply with Bankruptcy Local Rule 3007-1
9 and Bankruptcy Rule 3007(e).

10 **IX. NOTICE**

11 Notice of this Objection has been provided to: (a) the Office of the United States Trustee
12 for the Northern District of California; (b) the parties listed on **Exhibit A** annexed hereto under the
13 heading "Claimant"; (c) the "Standard Notice Parties" as defined in the Case Management Order;
14 and (d) the "Rule 2002 Notice Parties" as defined in the Case Management Order. The TCC
15 respectfully submits that such notice is sufficient under the circumstances.

16 **X. NO PREVIOUS REQUEST**

17 No previous request for the relief sought herein has been made by the TCC to this or any
18 other court.

19 **XI. CONCLUSION**

20 WHEREFORE, the TCC respectfully requests entry of an order, substantially in the form
21 attached hereto as **Exhibit C**, disallowing and expunging the claims listed on **Exhibit A** and
22 granting such other and further relief as this Court deems just and proper.

23 Dated: December 2, 2019

BAKER & HOSTETLER LLP

24 By: /s/ Robert A. Julian

25 *Attorney for The Official Committee of Tort*
26 *Claimants*